

APPENDIX

APPENDIX A

**BEFORE THE
INTERSTATE COMMERCE COMMISSION**

**EX PARTE 252 (SUB-NO. 1)
INCENTIVE PER DIEM CHARGES—1969**

**Petition of Respondent, Long Island Rail Road for Modification
of the Interim Order Dated December 12, 1969**

By an Interim Order dated December 12, 1969, in the above-captioned proceeding, the Commission, *inter alia*, proposed the prescription of "incentive" per diem rates pursuant to Section 1(14)(a) of the Interstate Commerce Act and established certain procedures for the handling of the proceeding.

The third and fourth ordering paragraphs of said Interim Order provide as follows:

"It is further ordered, that initial verified statements of facts, briefs, and statements of position in response to the said interim report may be filed on or before February 24, 1970; and that replies thereto may be filed on or before March 24, 1970."*

It is further ordered, that any party requesting oral hearing shall set forth with specificity the need therefor and the evidence to be adduced."

Section 1(14)(a) which contains the statutory authorization for the Commission to prescribe "incentive" per

* At the request of the LIRR contained in a letter dated January 27, 1970, the above dates were changed from February 25, 1970, and March 24, 1970, to March 17, 1970, and April 14, 1970, respectively, according to telegraphic advice from J. J. Fittipaldi, Deputy Director Acting, dated February 9, 1970.

diem rates also requires the Commission to hold a "hearing" prior to prescribing such rates.

The requirement for a hearing contained in Section 1(14)(a) is binding upon the Commission and such hearing must be conducted in accordance with 5 U.S.C. § 556 and 557.

See: *Wirtz v. Baldor Elect. Co.*, 337 Fed. 518
(U.S.C.A.—D.C.—1964)

Glendenning v. Ribicoff, 213 F. Supp. 301
(W.D. Mo.—1962)

Sosna v. Celebrezze, 234 F. Supp. 289 (E.
D. Pa.—1964)

The provisions of the Administrative Procedure Act (SU: S. C. § 556 and 557) guarantee the LIRR as a matter of right an oral hearing and as a matter of statutory policy, put the burden of proof upon the Commission as the proponent of the proposed scheme of "incentive" per diem. Further, it is impossible for the Long Island Rail Road, (hereinafter the "LIRR"), to file a meaningful brief as a party respondent to this proceeding until it has had an opportunity to see the evidence it is being confronted with, crossexamine the proponents witness and rebut such evidence as it deems appropriate. Absent this, it is the LIRR's position and contention that it has been deprived of the full and fair hearing guaranteed it by § 1(14)(a) of the Interstate Commerce Act, and 5 U.S.C. § 556 and 557.

WHEREFORE, it is respectfully requested that the Commission modify its Interim Order of December 12, 1969, as already amended, so as to provide:

1. For an oral hearing to be held in accordance to the provisions of 5 U.S.C. § 556 and 557 at which hearing, witnesses on behalf of the Commission, as the proponent of the proposed rules, shall introduce the

3a

evidence relied upon by the Commission in rendering its Interim Order; and

2. Providing the opportunity for all parties respondent, including the LIRR, to crossexamine all witnesses introducing evidence in the proceeding and where deemed appropriate to submit evidence in rebuttal; and
3. Providing a reasonable opportunity following the close of such hearings to file briefs with the Commission addressed to such questions of law and fact as the parties may deem appropriate, and for such other relief as may seem just and proper.

Respectfully submitted,

GEORGE M. ONKEN

Richard H. Stokes

Attorneys for Respondents

Jamaica Station

Jamaica, New York 11435